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International Law Situations

With Solutions and Notes

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## SITUATION I

### VESSELS AND NEUTRAL PORTS

States X and Y are at war. Other states are neutral. There have been several engagements between the vessels of war of X and Y.

(a) State B declares that it will maintain strict neutrality.

(1) The *Xara*, a cruiser of state X, has run upon a submerged reef 4 miles off state B while engaging vessels of war of state Y, but, though damaged, unseaworthy, and still pursued by vessels of Y, escapes to a port of B. State B declines to allow repairs of any kind in its waters unless the *Xara* be interned to the end of the war.

(2) State B declines to allow privileges in its harbors except such as are allowed to belligerent vessels of war to the *Aba*, a neutral merchant vessel of state A, which is entirely loaded with freight belonging to state X and bound for state A.

(3) State B declines to admit, except under the rules for vessels of war, the *Xebe* which claims to have been transformed from a supply ship of the navy of state X and to be registered in state X as a merchant vessel.

(b) The *Dobo*, a merchant vessel of state D, has taken a cargo in state E and delivered it at a port of state Y and then has taken on a new cargo there and delivered a part of this cargo at sea to a supply ship of the navy of Y.

State X protests to state E and to other neutral states demanding that the *Dobo* be treated as an auxiliary of the navy of Y.

(c) The *Xibi*, a vessel of war of state X, enters a naval port of state E in distress because short of fuel. The port is closed to commerce. The commander of the *Xibi* requests fuel for voyage to the nearest port of state X.

What would be the lawful action in each case?

#### SOLUTION

(a) 1. The *Xara* may remain in the port of neutral state B for 24 hours unless state B has previously issued special regulations. During the 24-hour sojourn the *Xara* may make such repairs as possible, using the personnel and material on board. After 24 hours the *Xara* should be interned.

2. Unless neutral state B has previously issued special regulations, it may not decline to allow to the *Aba* the usual privileges granted to neutral merchant vessels in its harbors.

3. If neutral state B and belligerent state X are not bound by special treaty agreement, and if state B has not previously issued special regulations, state B may legally decline to admit, except under the rules for vessels of war, the *Xebe* which has been transformed from a supply to a merchant vessel.

(b) There is no obligation on the part of state E or other neutral states to treat the *Dobo* as an auxiliary of the navy of state Y.

(c) If the *Xibi*, a vessel of war of state X, enters in distress a closed port of neutral state E, the *Xibi* should be interned or may be allowed or required to depart under pledge to take no further part in the war.

#### NOTES

*Value of preliminary agreements.*—While it is possible to regard the Hague Conventions of 1899 and 1907 and other conventions as falling short of stating the principles which might be in accord with justice.

it is essential to consider that the principles of justice are not yet standardized, and what seems to one state as just may not be so regarded by other states, and what is recognized at one period as just may not have the same appeal under other conditions or at another period. It may be much more important that some rules of conduct which are generally accepted be agreed upon in advance, though these are not ideal, rather than that no agreement exist upon any aspect of a subject, and the whole matter be the subject of controversy in a time of crisis when any agreement even upon minor points is difficult.

The value of agreements in advance may well be illustrated by the settlement of the Dogger Bank incident in 1904 through a Commission of Inquiry provided for in Hague Convention I of 1899. This convention was not ideal in its provisions, and was after this test much modified in 1907, but it did offer a means for settling a difficulty to the satisfaction of the parties at a time when relations were severely strained and when, if the convention had not already existed, it would have been doubtful whether negotiations after the event would have been successful.

*Three-mile limit.*—While much wider limits than 3 miles have been claimed for jurisdiction of the coast state over marginal seas, yet 3 miles at least is usually recognized as a minimum. During the World War some states, accustomed to claim in time of peace wider limits, renounced these claims when the duties of maintaining neutrality in the wider areas became too burdensome. No state has seemed inclined to claim a belt of jurisdiction in the marginal sea of less than 3 miles. There is a general acceptance of the right of a shore state to exercise jurisdiction beyond 3 miles for revenue and other national purposes. Many treaties and domestic laws prescribe 3 miles as the recognized limit of jurisdiction. The Convention Relating to the Nonfortifica-



tion and Neutralization of the Aaland Islands, Geneva, October 20, 1921, provides that:

"The territorial waters of the Aaland Islands are considered to extend for a distance of three marine miles from the low-water mark on the islands, islets, and reefs not permanently submerged." (9 L. N. T. S., p. 212.)

Submerged reefs outside the 3-mile limit are usually considered to be in the high sea and have been so regarded in international negotiations though wider claims have been made (23 American Journal of International Law, Spec. Sup. (1929), pp. 275 *et seq.*).

*Repairs in neutral port.*—When vessels were slow sailing and dependent upon winds and tides, ordinary repairs essential to seaworthiness were easily determined and the line between damages due to natural causes and those due to acts of the enemy were usually distinguishable. With the introduction of aids to navigation which made vessels largely independent of winds and tides, differences of opinion as to the extent and character of repairs in neutral ports on vessels of war became common. The old expression "perils of the sea" required new interpretations, but usually was held to cover cases of distress similar to those granted to sailing vessels.

The 24-hour sojourn would rarely be sufficient for repairs and was a comparatively recent restriction, though short sojourns were not questioned unless resort to shore resources for aid became necessary. It was generally regarded as unnecessary for the neutral authorities to concern themselves with what went on within a vessel of war during its lawful sojourn in port provided it did not involve aid in the way of matériel or personnel from the shore, i. e., so far as the vessel of war was a self-sufficient unit, it was free of neutral port regulations. The cause of damages which might be repaired by the ship itself within the lawful period of its sojourn was not regarded as a concern of the

neutral-port authorities. The reason for sojourn beyond the 24-hour limit would be a matter to be presented to the neutral for consideration as would the reason for requesting aid from shore.

The ground for extension of the period of sojourn or other special privileges came in a general way to be stated as for repairs due to damages from natural causes in distinction from damages due to combat or acts of the enemy. As was stated in the *American case* in discussing the rules of the Treaty of Washington, 1871.

"The repairs that humanity demand can be given, but no repairs should add to the strength or efficiency of a vessel, beyond what is absolutely necessary to gain the nearest of its own ports." (1931 Naval War College, International Law Situations, p. 88; I Papers relating to the Treaty of Washington, p. 71.)

"As the vessel enters the port, so is she to leave it, without addition to her effective power of doing injury to the other belligerent." (Ibid.)

*Hague Convention XIII, 1907*.—Article I of Hague Convention XIII of 1907 states the general principle of the relations of belligerents to neutrals in time of naval war as follows:

"Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from all acts which would constitute, on the part of the neutral Powers which knowingly permitted them, a non-fulfillment of their neutrality."

Article 17 applies particularly to repairs in neutral ports:

"In neutral ports and roadsteads belligerent ships of war can carry out only such repairs as are absolutely necessary to render them seaworthy, and can not add in any manner whatsoever to their fighting force. The neutral authorities shall decide what repairs are necessary, and these must be carried out with the least possible delay."

*Views on sojourn*.—There have been two points of view particularly emphasized which appeared from time

to time in discussions of the Institute of International Law and the Second Hague Conference of 1907.

Some favored the same treatment in a neutral port for a vessel of war and a merchant vessel provided the vessel of war did not enter the neutral port as a part of a naval operation. It was very properly objected that for the neutral authorities to be called upon to determine what acts of a vessel of war or vessels of war of belligerents were connected with naval operations would be to put upon such authorities an impossible task and to lay them open to recriminations from both parties. It was also shown that it would be presumptuous to assume that in time of war any movement of a vessel of war of a belligerent was not connected with naval operations.

The second point of view was based on an admission that the responsibilities of the neutral should be defined and that the minimum of responsibility in discrimination should rest upon neutral authorities. This had already been set forth in the 24-hour rule of sojourn with rules for departure of opposing belligerents. The taking of fuel was more clearly defined though rules of the Hague Convention XIII left opportunity for wide difference in practice.

It was admitted that a state might close its ports to vessels of war or make such regulations as it saw fit. It was recognized that it would be impossible in most cases for the neutral to determine the treatment to be accorded to a vessel of war on the basis of the cause of its entrance for this would imply a knowledge not usually obtainable, and if obtainable would make judgment upon it open to difference of opinion. What might seem a military reason to the neutral authorities might seem to the belligerent to be without military significance beyond that of every movement of the vessel. The general rule, therefore, which gained in favor was that entrance and sojourn of 24 hours without use of port



facilities other than refueling and taking on of supplies would be allowed. Internment for the duration of the war would follow unless there was special ground not due to military causes for granting a longer period of sojourn.

Those principles were particularly applied and became more clearly defined during the Russo-Japanese War (1904 Naval War College, International Law Situations, pp. 79-93; 1905 Naval War College, International Law Topics, pp. 154-170).

The reasons for granting any period of sojourn or a period beyond 24 hours is now considered to be within the competence of the neutral authorities, and these authorities must act in such manner as not to make the port liable to be regarded as an enemy base, and must use due diligence in preventing such use while not denying the treatment to which belligerents are entitled under the principles of humanity.

*Regulations on repairs.*—States have from time to time made pronouncements in regard to repairs. After the Hague conventions, Denmark, Norway, and Sweden jointly agreed upon rules of neutrality, December 21, 1912, which were separately adopted.

Article 5 (a) provided that—

“In the ports or roadsteads of the kingdom, belligerent war vessels can repair their damages only to the extent necessary for the security of navigation, and they can not increase their military force in any manner whatsoever. The authorities of the kingdom will indicate the nature of the repairs to be made. The repairs should be completed as rapidly as possible.” (1917 Naval War College, Int. Law Documents, p. 185.)

The Habana Convention, 1928, on Maritime Neutrality, article 9, states that—

“Damaged belligerent ships shall not be permitted to make repairs in neutral ports beyond those that are essential to the continuance of the voyage and which in no degree constitute an increase in its military strength.

“Damages which are found to have been produced by the enemy's fire shall in no case be repaired.



"The neutral state shall ascertain the nature of the repairs to be made and will see that they are made as rapidly as possible." (Report, Delegates of the United States, Sixth International Conference of American States, p. 219.)

Of this Habana convention the report said that the original draft before the subcommittee had contained some provisions "intended to change existing practice in the interest of neutrals." Objections were made to "variations from general usage." Desire was expressed that the proposals should conform to the practice of nations.

"The result was a modified draft, in large measure that of the thirteenth convention of the Second Hague Peace Conference of 1907, with sundry modifications and additions in order to take note of the measures which neutrals had taken to preserve their rights during the World War. As finally drafted and originally adopted, the project presupposed a war, in which the American Republics would be neutral. For this reason it was indispensable that the practice of nations should be strictly observed, as it would be undesirable on the part of the American states to attempt to change the general rights of all neutrals by a special agreement of their own." (Ibid., p. 18.)

*Brazil's rules on repairs, 1914.*—The General Rules of Neutrality issued by Brazil, August 4, 1914, provided for sojourn in Brazilian port longer than 24 hours in case of urgent need.

"ART. 7th. \* \* \*

"The case of urgent need justifies the staying of the warship or privateer at the port longer than twenty-four hours:

"1. If the repairs needed to render the ship seaworthy cannot be made within that time;

"2. In case of serious danger on account of stress of weather;

"3. When threatened by some enemy craft cruising off the port of refuge.

"These three circumstances will be taken into consideration by the Government in granting a delay for the refugee ship."

\* \* \* \* \*

"ART. 13th. The belligerent warships are allowed to repair their damages in the ports and harbors of Brazil only to the extent of rendering them seaworthy, without in any wise augmenting their military power,

"The Brazilian naval authorities will ascertain the nature and extent of the proper repairs, which shall be made as promptly as possible." (1916 Naval War College, International Law Topics, p. 10.)

*Statement of Professor Hyde.*—Professor Hyde points out that the rules in regard to internment leave a degree of uncertainty in regard to the nature of repairs which may be permitted in a neutral port, saying:

"It should be observed that the Hague Convention makes no distinction or limitation with reference to the causes of damage. A neutral State is thus regarded as free from an obligation to prevent the making of repairs necessitated by the conduct of the opposing belligerent, provided they merely serve to effect seaworthiness. In a strict sense, any repairs productive of seaworthiness, irrespective of the cause of damage, necessarily increase the fighting force of the recipient if it is otherwise capable of engaging in hostilities. To render, for example, an armed submarine fit to keep the sea, or to reach its nearest home port, may suffice also to enable the vessel to resume the offensive with the full measure of its strength.

"In brief, the existing rules draw a line of distinction which, at the present time, [1922] appears to be insufficient to prevent a neutral port offering permitted and requisite repairs from becoming in fact a base of operations. The question presents itself, therefore, whether in any reconsideration of existing regulations and of the practice growing out of them, maritime States should endeavor to cut down the privileges of repair, and proportionally lessen the opportunity for neutral territory so to augment the fighting power of belligerent ships." (2 Hyde, International Law chiefly as interpreted and applied by the United States, p. 731.)

(a) (1) *The "Xara" in port of B.*—It is generally held that a submerged reef more than 3 miles off the coast is in the high seas. Some states have maintained in time of peace wider claims to jurisdiction, but in time of war the obligations become more burdensome. A state which may claim a wider jurisdiction for fisheries, revenue, or other reasons would often claim three mile jurisdiction only under war conditions. Complications may arise when contiguous states claim different limits, as belligerents may have to accommodate them-

selves to variations which seem to them arbitrary and which may cause unnecessary friction.

In the case of the *Xara*, state B in admitting the cruiser to its port without immediate internment shows that it does not regard the engagement at the time the *Xara* runs upon the reef as within its limits.

The *Xara* was still pursued by vessels of State Y when it escaped to the port of State B. The use of this port of neutral State B as a port of refuge to escape capture would make the *Xara* liable to internment. Article 22 of the General Rules of Neutrality issued by Brazil, August 4, 1914, states, "Belligerent warships that are chased by the enemy, and, avoiding attack, seek refuge in a Brazilian port will be detained there and disarmed." (1916, Naval War College, International Law Situations, p. 13.) This rule does permit departure of vessels if their officers pledge not to engage in war operations. The Danish order of December 20, 1912, in the article relating to repair reads, "All repair relating to the fighting capacity of the vessel is prohibited." (Ibid., p. 51.) Rules similar to the above were issued by other states during the World War.

For repairs beyond these which could be made within 24 hours and for repairs involving use of resources from neutral sources, prior approval and authorization would be required, and for such aid the neutral would assume the responsibility. Matters relating solely to the internal economy of a vessel of war of a belligerent during its 24-hour sojourn are within the control of the commander.

*Neutral and belligerent rights.*—The rights and obligations of belligerents toward neutrals are not the same as or correlative to the rights and obligations of neutrals toward one another. The fact that a belligerent may have a right to capture or destroy a vessel under certain circumstances places no obligation upon a neutral to take any action in regard to this vessel.



It has often happened that a belligerent has suggested that neutrals take such action as would facilitate the conduct of war against an opponent, e. g., restrict the movements or acts of enemy vessels.

On August 27, 1918, the Secretary of State of the United States in a communication to the Chargé in Norway made a suggestion to the Norwegian Government as to the regulation of the use of Norwegian territorial waters, saying:

"The Norwegian Government cannot be unmindful of the fact that in the prosecution of the war being waged against the Central Powers the Government of the United States is transporting across the Atlantic Ocean hundreds of thousands of troops and immense quantities of supplies and munitions for their maintenance and use. Possessed of this knowledge the Norwegian Government must perceive that so long as German submarines are permitted to pass unmolested through the coastal waters of Norway into the Atlantic Ocean from the North Sea, the military forces of the United States, the supplies necessary for their subsistence, and the munitions required for their operations will be, while upon the high seas, in serious danger of submarine attack and destruction.

"In view of the menace to American interests which will result from the free passage of submarines through the territorial waters of Norway, the Government of the United States believes that the Norwegian Government will realize the obligation which rests upon it to prevent by every means in its power the passage of German submarines through waters within the jurisdiction of Norway. Furthermore it cannot fail to realize that if Norwegian waters are used by belligerent submarines as a rendezvous whence they can freely pass into the Atlantic Ocean for hostile purposes the waters so used may justly be considered a base of naval operations, the establishment of which within Norwegian jurisdiction the Government of the United States believes to be entirely contrary to the will and intention of the Government of Norway.

"In the circumstances the Government of the United States most earnestly urges the Norwegian Government to take all necessary steps to prevent a situation which might cause serious embarrassment to both Governments which would be deeply regretted by the Government of the United States as it has only the most friendly feeling for the Government and people of Norway and is desirous to prevent as well as to remove all



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causes of differences affecting the good relations of the two countries in their intercourse with each other." (Foreign Relations, U. S., 1918, Supplement I, volume II, p. 1783.)

In presenting the suggestion, the Chargé took occasion to emphasize several points, and referring to the passage of submarines said,

"(3) That as stated in my note the United States believed Norwegian territorial waters could justly be regarded as a base of naval operations if they are used by German submarines as a rendezvous, whence the latter can freely pass into the Atlantic Ocean for hostile purposes. Minister for Foreign Affairs rather questioned the validity of this statement; I said that so long as the Norwegians failed to prevent the passage of submarines through coastal waters, there was no essential difference between the situation created for German submarines in Norwegian waters by the protection afforded them by our respect for Norwegian neutrality, which was [restraining] us, and the situation in which submarines found themselves when under the protection of German fortresses and mine fields at their German base. Minister for Foreign Affairs admitted the force of the contention somewhat reluctantly." (Ibid., p. 1784.)

In the course of a reply on September 28, 1918, the Norwegian Minister of Foreign Affairs said:

"The thirteenth Hague convention of 1907 provides expressly in article 10 that a country's neutrality is not called in question by the mere fact that belligerent war vessels are permitted to pass through its territorial waters. No exception is made in this provision of the convention for submarine boats. The fact that Norway by a domestic regulation has conditionally forbidden such war vessels to pass through her territorial waters does not in any respect change the position of Norway under international law and gives the belligerents no right to make a demand on the Norwegian Government which is not based on general rules of international law. The regulation in question, as stated in my note of August 20, was called forth exclusively by consideration of Norway's own interests, and just as a similar regulation has [not] been made by all other neutral states, so Norway would also be fully entitled by international law to revoke this regulation if, according to circumstances, at a given time Norway should no longer find it compatible with her interests.

"There is no information before the Norwegian Government that Norwegian territorial waters are being used by foreign submarines as a 'rendezvous'. None of the circumstances surrounding the cases of sojourn of submarines in territorial waters which the Norwegian naval authorities have observed or been informed of or which are brought by the British Government confidentially to the knowledge of the Norwegian Government, indicate that these cases involved anything else than passage." (Ibid., p. 1786.)

Later the Norwegian Government announced that it had mined its territorial waters.

*Attitude of the United States, 1914.*—By a circular of the Department of State of October 15, 1914, replying to queries upon the right to supplying articles of war, the attitude of the Government was stated.

"In the first place it should be understood that, generally speaking, a citizen of the United States can sell to a belligerent government or its agent any article of commerce which he pleases. He is not prohibited from doing this by any rule of international law, by any treaty provisions, or by any statute of the United States. It makes no difference whether the articles sold are exclusively for war purposes, such as firearms, explosives, etc., or are foodstuffs, clothing, horses, etc., for the use of the army or navy of the belligerent.

"Furthermore, a neutral government is not compelled by international law, by treaty, or by statute to prevent these sales to a belligerent. Such sales, therefore, by American citizens do not in the least affect the neutrality of the United States.

"It is true that such articles as those mentioned are considered contraband and are, outside the territorial jurisdiction of a neutral nation, subject to seizure by an enemy of the purchasing government, but it is the enemy's duty to prevent the articles reaching their destination, not the duty of the nation whose citizens have sold them. If the enemy of the purchasing nation happens for the time to be unable to do this that is for him one of the misfortunes of war; the inability, however, imposes on the neutral government no obligation to prevent the sale.

"Neither the President nor any executive department of the Government possesses the legal authority to interfere in any way with trade between the people of this country and the territory of the belligerent. ~~There is no act of Congress conferring such authority on the belligerent.~~ There is no act of Congress conferring such authority or prohibiting traffic of this sort with European nations, although in the case of neighboring American Republics Con-



gress has given the President power to proclaim an embargo on arms and ammunition when in his judgment it would tend to prevent civil strife." (1916 Naval War College, International Law Topics, p. 95.)

*British position, February 10, 1915.*—In a long note of Sir Edward Grey, of February 10, 1915, there was an attempt to justify the detention of American cargoes destined for neutral European ports. In this note was foreshadowed the attitude which subsequently took form in retaliatory measures. Following explanation of many British acts, the note concludes:

"I have given these indications of the policy which we have followed, because I cannot help feeling that if the facts were more fully known as to the efforts which we have made to avoid inflicting any avoidable injury on neutral interests, many of the complaints which have been received by the administration in Washington, and which led to the protest which your excellency handed to me on the 28th December would never have been made. My hope is that when the facts which I have set out above are realized, and when it is seen that our naval operations have not diminished American trade with neutral countries, and that the lines on which we have acted are consistent with the fundamental principles of international law, it will be apparent to the Government and people of the United States that His Majesty's Government have hitherto endeavoured to exercise their belligerent rights with every possible consideration for the interests of neutrals.

"It will still be our endeavour to avoid injury and loss to neutrals, but the announcement by the German Government of their intention to sink merchant vessels and their cargoes without verification of their nationality or character, and without making any provision for the safety of noncombatant crews or giving them a chance of saving their lives, has made it necessary for His Majesty's Government to consider what measures they should adopt to protect their interests. It is impossible for one belligerent to depart from rules and precedents and for the other to remain bound by them." (1915 U. S. Foreign Relations, Supplement, p. 333.)

*Acts of 1935 and 1936.*—On August 31, 1935, a joint resolution of Congress was adopted:

"Providing for the prohibition of the export of arms, ammunition, and implements of war to belligerent countries; the prohi-

bition of the transportation of arms, ammunition, and implements of war by vessels of the United States for the use of belligerent-states; for the registration and licensing of persons engaged in the business of manufacturing, exporting, or importing arms, ammunition, or implements of war; and restricting travel by American citizens on belligerent ships during war."

Detailed regulations were made for carrying into effect this resolution.

Another joint resolution, approved February 29, 1936, elaborated the resolution of August 31, 1935, and extended the period of the operation to May 1, 1937.

*Changed American attitude, 1935-36.*—The President of the United States had on October 5, 1935, declared that a state of war unhappily existed between Ethiopia and the Kingdom of Italy" and under the joint resolution of February 29, 1936, he proclaimed on the same date "that a state of war unhappily continues to exist between Ethiopia and the Kingdom of Italy."

Under this proclamation persons within the jurisdiction of the United States were to abstain from export of arms, ammunition, or implements of war to Ethiopia or Italy or Italian possession or to a neutral port for transshipment.

The changed attitude of the Government of the United States is evident in the detailed list of articles named under the categories of "arms, ammunition, and implements of war." This list is as follows:

*"Category I*

"(1) Rifles and carbines using ammunition in excess of caliber .22, and barrels for those weapons;

"(2) Machine guns, automatic or autoloading rifles, and machine pistols using ammunition in excess of caliber .22, and barrels for those weapons;

"(3) Guns, howitzers, and mortars of all calibers, their mountings and barrels;

"(4) Ammunition in excess of caliber .22 for the arms enumerated under (1) and (2) above, and cartridge cases or bullets for such ammunition; filled and unfilled projectiles or forgings



for such projectiles for the arms enumerated under (3) above; propellants with a web thickness of 0.015 inch or greater for the projectiles of the arms enumerated under (3) above;

“(5) Grenades, bombs, torpedoes and mines, filled or unfilled, and apparatus for their use of discharge;

“(6) Tanks, military armored vehicles, and armored trains.

#### *“Category II*

“Vessels of war of all kinds, including aircraft carriers and submarines.

#### *“Category III*

“(1) Aircraft, assembled or dismantled, both heavier and lighter than air, which are designed, adapted, and intended for aerial combat by the use of machine guns or of artillery or for the carrying and dropping of bombs, or which are equipped with, or which by reason of design or construction are prepared for, any of the appliances referred to in paragraph (2) below;

“(2) Aerial gun mounts and frames, bomb racks, torpedo carriers, and bomb or torpedo release mechanisms.

#### *“Category IV*

“(1) Revolvers and automatic pistols using ammunition in excess of caliber .22;

“(2) Ammunition in excess of caliber .22 for the arms enumerated under (1) above, and cartridge cases or bullets for such ammunition.

#### *“Category V*

“(1) Aircraft, assembled or dismantled, both heavier and lighter than air, other than those included in Category III;

“(2) Propellers or air screws, fuselages, hulls, wings, tail units, and under-carriage units;

“(3) Aircraft engines, assembled or unassembled.

#### *“Category VI*

“(1) Livens, projectors, and flame throwers;

“(2) Mustard gas (dichlorethylsulphide), lewisite (chlorovinylchlorarsine and dichlorodivinyldichlorarsine), ethyldichlorarsine, methyldichlorarsine, ethyliodoacetate, brombenzylcyanide, diphenolchlorarsine, and dyphenolcyanoarsine.

“And I do hereby enjoin upon all officers of the United States, charged with the execution of the laws thereof, the utmost diligence in preventing violations of the said joint resolution, and

this my proclamation issued thereunder, and in bringing to trial and punishment any offenders against the same."

*Belligerent cargoes.*—Ordinarily a neutral state is concerned with clearance of vessels loaded in its ports for belligerent destinations. The use of its ports as sources of supply to belligerents may under certain circumstances constitute those ports bases for belligerent operations which would make the neutral state liable. Cargoes bound for foreign neutral ports from a foreign neutral port regardless of the nature of the cargo, if not under some domestic restriction, as perhaps opium in some states, are not liable to interference or delay and the neutral carrier has no responsibility other than for port regulations.

The act of March 4, 1915, by which the United States regulated the use of its ports, empowered the President to direct that clearance be withheld—

"from any vessel, American or foreign, which he has reasonable cause to believe to be about to carry fuel, arms, ammunition, men, or supplies to any warship, or tender, or supply ship of a belligerent nation, in violation of the obligations of the United States as a neutral nation." (38 Stat., Pt. I, 1926; 1929 Naval War College, International Law Situations, p. 136.)

Where the sole question in regard to treatment of a neutral vessel relates to its cargo, the destination is the essential factor.

In a memorandum of the Department of State of September 19, 1914, it was said:

"6. A merchant vessel, laden with naval supplies, clearing from a port of the United States for the port of another neutral nation, which arrives at its destination and there discharges its cargo, should not be detained if, on a second voyage, it takes on board another cargo of similar nature.

"In such a case the port of the other neutral nation may be a base for the naval operations of a belligerent. If so, and even if the fact is notorious, this Government is under no obligation to prevent the shipment of naval supplies to that port. Commerce in munitions of war between neutral nations cannot as a rule be a basis for a claim of unneutral conduct, even though

there is a strong presumption or actual knowledge that the neutral state, in whose port the supplies are discharged, is permitting its territory to be used as a base of supply for belligerent warships. The duty of preventing an unneutral act rests entirely upon the neutral state whose territory is being used as such a base.

"In fact this principle goes further in that, if the supplies were shipped directly to an established naval base in the territory or under the control of a belligerent, this Government would not be obligated by its neutral duty to limit such shipments or detain or otherwise interfere with the merchant vessels engaged in that trade. A neutral can only be charged with unneutral conduct when the supplies, furnished to a belligerent warship, are furnished directly to it in a port of the neutral or through naval tenders or merchant vessels acting as tenders departing from such port." (1916 Naval War College, International Law Topics, p. 92.)

*Public property on vessel.*—It might be possible for the entire cargo of a merchant vessel to belong to the state whose flag it is flying or to another state. Certain states have considered private property in the commonly accepted sense as no longer recognized. The Union of Socialist Soviet Republics, while not recognizing some of the widely accepted doctrines in regard to property, has by reciprocal treaties agreed to act in accord with international law in treatment of property (Taracouzio, Soviet Union and International Law, chap. IX).

Even in the World War and earlier, vessels were chartered entire by states and loaded with cargoes belonging to the state. The unratified declaration of London, 1909, in article 46 provided for the liability of a neutral vessel chartered entire by a belligerent government stating that it should be the same as a merchant vessel of the enemy. The report of the conference explains this clause:

"The vessel is chartered entire by the enemy Government. It is then wholly at disposal of the Government, which can use her for different purposes more or less directly connected with the war, notably for purposes of transportation; such is the position of colliers which accompany a belligerent fleet. There will often be a charter-party between the belligerent Government and the



owner or master of the vessel ; but it is only a question of proof. The fact of the charter of the vessel entire suffices, in whatever way it may be established." (1916 Naval War College, International Law Topics, p. 109.)

While so far as the belligerent is concerned, the action of a neutral vessel chartered entire by an opposing belligerent would justify treatment of the vessel as an enemy merchant vessel, it has not been generally held that any neutral would be placed under special obligations as regards such a vessel. The neutral state whose flag the chartered vessel is entitled to fly may withdraw its protection from the vessel, but neither that state nor any other state was committed to taking any special action on account of unneutral service by the vessel. The right of a belligerent to prevent or to penalize an act of a neutral national or vessel does not imply an obligation on the part of a neutral state to prevent the act.

*Article 12, Habana Convention on Maritime Neutrality.*—Article 12 of the Habana Convention on Maritime Neutrality, 1928, is under the section on duties and rights of belligerents and therefore relates primarily to the action of belligerents. This article provides that—

"The neutral vessel shall be seized and in general subjected to the same treatment as enemy merchantmen :

"(a) When taking a direct part in the hostilities ;

"(b) When at the orders or under the direction of an agent placed on board by an enemy government ;

"(c) When entirely freight-loaded by an enemy government ;

"(d) When actually and exclusively destined for transporting enemy troops or for the transmission of information on behalf of the enemy.

"In the cases dealt with in this article, merchandise belonging to the owner of the vessel or ship shall also be liable to seizure." (Report, Delegates of the United States; Sixth International Conference of American States, p. 220.)

These provisions are such as would apply to vessels engaged in unneutral service and are such as have been applied.



Article 22 of the same convention provides that :

"Neutral states are not obligated to prevent the export or transit at the expense of any one of the belligerents of arms, ammunitions and in general of anything which may be useful to their military forces.

"Transit shall be permitted when, in the event of a war between two American nations, one of the belligerents is a Mediterranean country, having no other means of supplying itself, provided the vital interests of the country through which transit is requested do not suffer by the granting thereof." (Ibid., p. 222.)

(a) (2) *The "Aba" in port of B.*—There has been some question as to the interpretation of the 1928 Habana Convention on Maritime Neutrality, article 12. This article being under Section II, Duties and Rights of Belligerents and not under Section III, Rights and Duties of Neutrals applies to treatment by a belligerent of a neutral vessel as an enemy merchant vessel "when entirely freight-loadel by an enemy government."

This provision is similar to provisions in article 46 of the unratified declaration of London of 1909, but this article referred to the treatment of a neutral vessel by a belligerent and not to the treatment of a vessel of one neutral by another neutral.

The fact that two states are at war does not put a neutral state under obligation, nor does it give a neutral state the right to interfere with the commerce of another neutral state. The *Aba*, a neutral merchant vessel of state A, entirely loaded with freight belonging to state X, would be liable outside neutral jurisdiction to interference by state Y, but would not be in the category of vessels of war. Its cargo bound for state A has a neutral destination and is, so far as state B is concerned, lawful commerce.

*Transformation from war to merchant vessel.*—In early maritime wars it was often difficult to distinguish between vessels which might engage in war and those which were engaged in purely peaceful undertakings.

Armed merchant vessels and privateers were the entire complement of some fleets sailing against an enemy. The transition to the type of vessel solely designed for war purposes was slow and the professional training of the personnel for these vessels has been a late development.

Naturally the transformation from merchant vessel to vessel of war or from vessel of war to merchant vessel would not be a problem till the characteristics of such vessels were clearly marked. The distinction in service and in treatment became more essential as the status of neutrality developed. The neutral state was after a time regarded as responsible for the conduct of vessels under belligerent flags while such vessels were in neutral ports. It was, therefore, essential that the neutral authorities be able to distinguish between vessels of war and merchant vessels, since neutral obligations differed in regard to these classes, and the privileges of these vessels in a neutral port differed.

*Consideration at the Naval War College.*—In 1906, before the Second Hague Peace Conference of 1907, and after the experiences of the Russo-Japanese War of 1904–5, the matter of need of a clearly established character particularly for subsidized, auxiliary, and other vessels which might be of special service when placed under naval control, was discussed before the Naval War College. The conclusions of the Naval War College discussion was that “the use for all purposes of naval warfare, of auxiliary, subsidized, or volunteer vessels regularly incorporated in the naval forces of a country, is in accord with general opinion and practice, and that this addition to their regular naval forces in time of war is contemplated by nearly all if not all the principal maritime nations.” Convention VII, which was drafted at the Second Hague Peace Conference but not signed by the America delegates, recognized that it was probable that merchant vessels would



be incorporated in the fighting fleet in time of war, and that it was essential that the character of such vessels should be established both for belligerents and for neutrals. There was, however, wide divergence of view among the states represented at The Hague in 1907. Austria, France, Germany, and Russia were among the states upholding the right of conversion at sea, while Great Britain was among the states opposing such conversion.

Article XIV of the Washington Treaty of 1922 on the Limitation of Naval Armament definitely refers to preparations made "In merchant ships in time of peace for the installation of warlike armaments for the purpose of converting such ships into vessels of war." This article limits such preparation to the "necessary stiffening of decks for the mounting of guns not exceeding 6-inch caliber", and is binding only on the contracting parties for the duration of the treaty. Conversion of merchant vessels to warlike use is, therefore, now generally recognized by maritime states as lawful, and the only problem is one of degree of limitation on such conversion.

*Discussion at The Hague, 1907.*—In the discussion at the Second Hague Peace Conference, 1907, there was general assent to the right of a belligerent to convert merchant vessels into vessels of war as analagous to enrolling militia in its forces on land. It was also unanimously agreed that proper measures for responsible government control and identification should be taken. Very early in the Conference (June 28, 1907) it was proposed by Dr. Lammasch of Austria-Hungary that the "conversion shall be permanent and reconversion into a merchant ship shall be forbidden". Later Dr. Lammasch explained that conversion should be for the period of the war and reconversion should be prohibited.

Regarding conversion of a merchant vessel to a vessel of war in a neutral port, Lord Reay, of Great Britain, said, on July 12, 1907,



"A vessel which should enter a neutral port simply as a vessel belonging to the merchant marine and which should leave the port as a war-ship with the necessary commission would have undergone complete conversion in neutral waters and would have increased its value as a fighting unit. But a neutral may not, without violating the principles of neutrality, permit a belligerent to increase its value as a fighting vessel in neutral territorial waters. It follows, therefore, that a neutral State may not permit, under penalty of incurring the same reproach, a vessel which enters its territorial waters as a noncombatant to quit those waters as a war-ship duly authorized by a belligerent State and equipped to take part in hostilities.

"But if the neutral is bound to see that its neutrality is respected in its territorial waters, the belligerent is likewise bound to abstain from violating that neutrality. It is therefore clear that, if the fact of a neutral State's permitting a belligerent vessel to be converted into a war-ship within its territorial waters constitutes a violation of neutrality, it is likewise the belligerent's duty not to commit an act of this kind in neutral territorial waters, and that any vessel which has thus been converted by disregarding the neutral's neutrality and the duties of a belligerent has not regularly acquired the character of a war-ship and its status as such must not be recognized." (III Proceedings, Hague Peace Conferences, Carnegie Endowment translation, p. 812.)

The Japanese representative at the Conference saying that—

"the question of reconversion is closely related to the question of the place where conversion may be effected,"

remarked also that—

"The only object that the committee has in mind is to diminish, so far as possible, the difficulties caused to neutrals by unrestricted conversion and reconversion. In so far as Japan is concerned she cannot admit the prohibition of reconversion as long as the war lasts and she prefers to decrease the difficulties above referred to by restricting the places where conversion or reconversion may take place to the restriction of the length of time which these vessels must observe before they may be reconverted." (III Proceedings of the Hague Peace Conferences, Carnegie Endowment for International Peace, p. 993.)

The convention finally agreed upon at The Hague in 1907 left the difficult question "whether the conversion

of a merchant ship into a war-ship may take place upon the high seas" unsettled. The question of reconversion was also left unsettled.

*Attitude on reconversion, 1907.*—The attitude upon reconversion at the Second Hague Peace Conference may also be seen from the discussion in the Fourth Commission, Committee of Examination, on August 30, 1907.

"With regard to the declaration of conversion, the President recalls that there is an Austro-Hungarian proposal which does not permit reconversion as long as hostilities last.

"His Excellency Baron Von Macchio states that he has nothing to add to the statement of reasons for this proposal made by Mr. Lammasch and that he maintains the proposal.

"His Excellency Mr. Keiroku Tsudzki asks why reconversion is prohibited, inasmuch as it is possible to change the class even of war-ships during the course of hostilities.

"His Excellency Mr. Hammarskjöld replies that the allowing of successive conversions and reconversions of vessels on the high seas would cause the most serious difficulties to the neutrals they encountered, and it is for the purpose of avoiding these difficulties that the Austro-Hungarian proposal has been presented.

"His Excellency Lord Reay supports the Austro-Hungarian proposal for the same reasons as those indicated by his Excellency Mr. Hammarskjöld.

"Mr. Fromageot remarks that the condition of permanence aims to prevent abuses; neutrals should not be given any anxieties on this score.

"His Excellency Mr. Keiroku Tsudzuki would prefer that the limitation of the right to conversion and reconversion should apply not to the right itself but to the places where it may be exercised.

"Jonkheer van Karnebeek recalls the amendment proposed by Mexico at the seventh meeting of the Commission, laying down clearly the rule that the prohibition of reconversion applies only to the duration of the war.

"His Excellency Mr. Keiroku Tsudzuki sees no necessity of accepting the Austro-Hungarian proposal as long as the right of conversion on the high seas is not recognized. It might be accepted only after it has been agreed to admit the principle of the right of conversion on the high seas. But even in that case he does not see why reconversion in national ports might not be permitted.



"The President thinks that under these circumstances it is useless to take a vote." (III Proceedings of the Hague Peace Conference, Carnegie Endowment for International Peace translation, p. 999.)

*British proposal, 1907.*—At the Second Hague Peace Conference, 1907, Great Britain defined the term "warship" as follows:

"There are two classes of war-ships:

"A. Fighting ships;

"B. Auxiliary vessels.

"A. The term 'fighting ship' shall include all vessels flying a recognized flag, which are armed at the expense of the State for the purpose of attacking the enemy, and the officers and crew of which are duly authorized for this purpose by the Government to which they belong. It shall not be lawful for a vessel to assume this character except before its departure from a national port, nor to relinquish it except after its return to a national port.

"B. The term 'auxiliary vessel' shall include all merchant ships, whether belligerent or neutral, which are used for the transportation of sailors, munitions of war, fuel, provisions, water, or any other kind of naval supplies, or which are designed for making repairs, or charged with the carrying of dispatches or the transmission of information, if the said vessels are obliged to carry out the sailing orders given them, either directly or indirectly, by a belligerent fleet. The definition shall likewise include all vessels used for the transportation of military troops." (III Proceedings Hague Peace Conferences, p. 1116.)

The British delegate later withdrew the preamble in regard to two classes of warships and explained that it was the aim of the British proposal—

"to assimilate to the military vessels of a naval force, with respect to the treatment to which they are exposed, merchant ships, whether employed in the service of this fleet for any purpose or placed under its orders, or serving to transport troops in any way, thus plainly rendering hostile assistance to the fleet." (Ibid., p. 853.)

*Institute of International Law, 1913.*—Professor Fauchille after an exhaustive study presented to the Institute of International Law at its Oxford Session in



1913 a project for a Manual of Naval War embodying more than 150 articles.

Articles 11 and 12 of the project were:

"ART. 11. *Le navire transformé en navire de guerre conservera ce caractère pendant la durée des hostilités, et il ne pourra pendant ce temps être à nouveau transformé en navire public ou en navire privé.*

"ART. 12. *Transformation des navires militaires en navires publics ou privés.—Un navire militaire ne peut, tant que durent les hostilités, être transformé en navire public ou en navire privé.*" (26 Annuaire de l'Institut de Droit International (1913), p. 214.)

These articles were among those receiving extended comment which was summarized as follows:

"Aux termes des articles 11 et 12 du projet, tant que durent les hostilités, un navire public ou privé transformé en bâtiment de guerre ne peut reprendre sa première qualité pas plus qu'un bâtiment de guerre ne peut être transformé en navire public ou privé. Ces dispositions ont été textuellement reproduites dans le texte de la Commission. Une autre solution eût donné à un belligérant un moyen trop commode de faire échapper ses bâtiments de guerre à la destruction imminente par son adversaire, et de leur procurer en port neutre les provisions et le combustible nécessaires.

"Quelques membres de la Commission ont fait remarquer qu'en définitive l'article 11 n'était qu'un cas particulier de l'article 12, et qu'il serait dès lors préférable de réunir les deux articles en un seul, qui, suivant une rédaction proposée par M. Dupuis, pourrait être ainsi conçu: 'Les navires de guerre ne peuvent, pendant la durée des hostilités, être transformés en navires publics ou privés. Il n'y a, à cet égard, aucune distinction entre les navires de guerre qui avaient cette qualité à l'ouverture des hostilités et ceux qui l'ont acquise postérieurement'. Mais, après réflexion, on a décidé que, pour plus de clarté, on maintiendrait dans le projet deux dispositions distinctes.

"Au sujet de la retransformation, M. Edouard Rolin Jaequemyns a posé à la Commission une question. Si un navire public ou privé, transformé en bâtiment de guerre par un belligérant, est pris par son adversaire, ce dernier peut-il le retransformer en navire public ou privé? La retransformation ne doit-elle pas être défendue qu'au seul belligérant qui a procédé à la transformation? Cette distinction ne pouvait être admise par la Commission dès lors qu'elle adoptait l'article 12, qui

stipule d'une manière générale qu'un bâtiment de guerre ne peut, tant que durent les hostilités, être transformé en navire public ou privé. Il y a, d'ailleurs, les mêmes raisons de décider dans les deux hypothèses, quel que soit l'auteur de la transformation. La Commission a donc tranché la question posée par M. Rolin en décidant que ce qui est interdit dans l'article 11 c'est la retransformation 'par n'importe laquelle des parties belligérantes'. M. Kaufmann avait toutefois insisté particulièrement pour que la retransformation ne fût défendue qu'au belligérant qui a fait la transformation; d'après lui, le bâtiment de guerre d'un belligérant qui est pris par l'ennemi cesse, par le fait même de la prise, d'être un bâtiment de guerre; et il doit pouvoir dépendre du capteur de faire du navire l'emploi qu'il jugera convenable.

"Mais qu'arrivera-t-il si un bâtiment de guerre a été, contrairement à la loi, transformé en navire public ou en navire privé? Il semble que la transformation, étant illégale, devrait être réputée non avenue et qu'ainsi le navire continuera d'être un bâtiment de guerre. Cela est-il toutefois possible? Comment concevoir qu'un navire puisse avoir la qualité de bâtiment de guerre s'il ne remplit aucune des conditions caractéristiques du vaisseau de guerre? L'admettre à user, dans ces conditions, des pouvoirs des navires militaires, ne serait-ce pas enlever toute sanction à l'acte illégal et, en définitive, autoriser la participation aux hostilités d'autres navires que ceux qui sont vraiment des bâtiments de guerre? M. Kaufmann a proposé de déclarer qu'un tel navire perdrait les droits des bâtiment de guerre mais en conserverait les charges. M. Strisower a estimé qu'au point de vue pratique la proposition de M. Kaufmann entraînait dans des questions qu'il appartenait au juge de résoudre. La difficulté paraissant insoluble, la Commission a, en fin de compte, décidé de la réserver." (Ibid, p. 215.)

As a result of the discussions the ideas of articles 11 and 12 were embodied in article 10 of what came to be known as the Oxford Manual of Naval War, 1913, and this article 10 was translated as:

"ARTICLE 10. *Conversion of war-ships into public or private vessels.*—A war-ship may not, while hostilities last, be converted into a public or private vessel." (Resolutions of the Institute of International Law, Carnegie Endowment for International Peace translation, p. 176.)

*Precautions against conversion.*—The Secretary of Commerce of the United States in 1914 took measures



to prevent conversion of merchant vessels into vessels of war in American ports. These precautions were in excess of those usually taken. As reported to the Secretary of State, August 6, 1914, the collector of Customs at New York was instructed by telegram as follows:

"Have representative of each foreign vessel in your port certify to this Department whether she is a merchant vessel intended solely for the carriage of passengers and freight, excluding munitions of war, or whether she is a part of the armed force of her nation. This information is for purpose of maintaining the neutrality of the United States under recent proclamation President. Clearance will be refused in absence of this certificate.

"Wire Department before issuing clearance papers to foreign vessels unless you are satisfied after careful inspection that ship has not made any preparations while in port tending in any way to her conversion into a vessel of war. Taking on abnormal amount of coal, except in case of colliers, would indicate such conversion. Unpacking of guns already on board would be conclusive. Painting of vessel a war color would indicate conversion. It must be clear that she is not to be used for transportation recruits or reserves for a foreign army or navy. This does not prevent transportation of passengers in usual sense, as where there are women and children and men of different nationalities even though among them there were a few reserves without your knowledge. If her passengers are nearly all men and practically all of same nationality, clearance cannot be granted. It must be unquestionable that she has no arms or munitions of war aboard." (1914, U. S. Foreign Relations, Supplement, p. 595.)

In the instructions of August 10, 1914, signed by the Secretary of the Treasury and by the Secretary of Commerce, it was stated,

"5. When a vessel of a belligerent power, which has arrived as a merchant vessel, alters, or attempts to alter, her status as a merchant vessel or there is reason to believe she intends to alter such status, so as to become an auxiliary cruiser or an armed vessel in any degree, you will immediately notify the department by wire, giving all particulars. Any of the following acts will constitute such a change of status: (a) The placing in position or otherwise changing the location of guns which were



on board the vessel at the time of her arrival; (b) so changing the appearance, color, rig, or equipment of a vessel as to render her suitable for some purpose of war; (c) the taking on board of guns, arms, or ammunition under circumstances which in any way indicate the outfitting of the vessel for any purpose of war, or in aid of a military expedition." (Ibid, p. 597.)

*The Prinz Eitel Friedrich.*—A memorandum of March 13, 1915, when Mr. Lansing was counselor of the Department of State, outlines the attitude of the Department upon conversion and use of the flag.

"In a conversation this morning with the German Ambassador, relative to the sinking of the *William P. Frye* by the *Prinz Eitel Friedrich*, and the presence of the latter vessel at Newport News, I said to him that I thought this Government had shown the German Government very considerable consideration in regard to the vessel at Newport News. He asked me in what way it had been shown, to which I replied 'in not seizing the vessel and arresting the captain for piracy.' He said he did not understand what I meant. I said to him that we had no proof that the *Prinz Eitel Friedrich* was a German cruiser; that she, so far as the evidence disclosed, was a merchantman; that we had not been notified of her conversion into a cruiser and that she did not appear in the list of war vessels of Germany. The Ambassador said that she was in command of officers of the German Navy, to which I replied that so were other merchant vessels of German nationality, and that that was no evidence of her public character. He then said that she was flying the naval flag of Germany. I answered him that I did not think the flag she was flying was any indication of her character; that he might recall the fact that the cruiser *Emden* entered a port in the Malay Peninsula with a Japanese naval flag flying, but that that fact did not make the *Emden* a Japanese war vessel. He asked me what I thought should be done and I said that I thought this Government should be immediately notified of the conversion of the *Prinz Eitel Friedrich* into a cruiser and that she had entered our port as a public ship of Germany and that he further should state whether it was the intention to make repairs, not to make repairs, or to intern; that in case we were not advised that the vessel intended to make repairs there was no other recourse but to order her to leave port within twenty-four hours. The Ambassador said he would give the matter his immediate attention." (1915 U. S. Foreign Relations, Supplement. p. 824.)

The German Ambassador asked that the *Prinz Eitel Friedrich* be allowed to remain in Newport News longer than 24 hours for necessary repairs, and stated that she was formerly a steamer of the North German Lloyd and had been commissioned as an auxiliary cruiser at Tsingtao according to the seventh convention of The Hague, 1907. Fourteen working days were allowed for putting the vessel in seaworthy condition. In explaining the nature of the repairs in a memorandum to the British Ambassador, a State Department memorandum of March 30, 1915, said,

"As to the point made by the British Embassy that the cleaning and painting of the bottom of the *Prinz Eitel Friedrich* and the making of engine-room repairs will materially increase her fighting efficiency, it is only necessary to state that this conclusion may be drawn from any work in the nature of repairs which may be done upon a cruiser while in port, such as repairs to her steam pipes or to any part of the ship whatever. It is presumed the ship would not have come into port except to receive repairs or to obtain supplies, and therefore it is not to be supposed that she would leave the port in the same condition as that in which she arrived, that is, without having her fighting efficiency increased beyond what it was when she entered.

"The Government has had in mind the principle laid down by Mr. Clay, Secretary of State, in the case of the privateer *Juncal* which put in at Baltimore for repairs after an action at sea with a Brazilian cruiser. Mr. Clay stated:

"'Whilst you will not fail to allow her the usual hospitality, and to procure the necessary refreshments, the President directs that you will be careful in preventing any augmentation of her force and her making any repairs not warranted by law. With respect to the latter article, the reparation of damages which she may have experienced from the sea is allowable, but the reparation of those which may have been inflicted in the action is inadmissible.'

"In the opinion of the Government, a foul bottom is clearly a damage which the *Prinz Eitel Friedrich* 'experienced from the sea.'" (Ibid, p. 830.)

*The Prinz Eitel Friedrich* was subsequently interned in the United States.



*Reconversion of interned vessels of war.*—In 1915 question was raised in regard to the repairs and changes which the German authorities desired to have made in the converted vessels *Kronprinz Wilhelm* and *Prinz Eitel Friedrich* then interned at Norfolk, Virginia. In the communication, it was stated,

"Internment conditions should not stand in the way of starting the work, since Article 24 of the second [thirteenth?] Hague convention only makes it the duty of a neutral power to take such measures as it considers necessary to render the interned ship incapable of taking the sea during the war. The ship can thus be prevented from putting to sea by removing such parts as are important to her propulsion, screws, cylinder heads, and so forth, and, if, in addition, the neutral state places the ship's officers and men under sufficient restraint to prevent them from again joining their home-fighting forces, it discharges all its neutral obligations.

"Internal improvements do not impair the ship's internment and, in the present case, it is all the more so as the proposed work will divest the steamers of the characteristics of a war-ship.

"The repairs do not constitute any warlike operation but a purely business proposition, the sole object of which is to save expenses later." (1915 U. S. Foreign Relations, Supplement, p. 839.)

In the reply of the Secretary of State to the German Ambassador it was said,

WASHINGTON, December 22, 1915.

"EXCELLENCY: I have the honor to acknowledge the receipt, in due course, of your note of November 11, 1915, relative to the applications made by the commanders of the interned German vessels *Kronprinz Wilhelm* and *Prinz Eitel Friedrich* for permission for those ships to be put in full repair, and, in the case of the *Kronprinz Wilhelm*, for permission to begin the restoration of passenger accommodations.

"In reply I have the honor to say that, after full reconsideration of the question of the repairs proposed to be made on these two vessels, I regret to inform you that this Government can not consent to the extensive repairs desired to be made so long as they involve the reconversion of the vessels into merchant ships and the consequent loss of their naval character. The position of this Government is briefly that



internment applies to vessels stamped with a naval character, and some question may arise as to the exercise of the right of interning the vessels in question and their officers and crews, if they were allowed to assume a merchant character." (Ibid, p. 843.)

*British instructions, 1915.*—Certain instructions were issued for the conduct of armed merchantmen on October 20, 1915, but were not made public till March 3, 1916. Among these was the following:

"(4) The status of a British armed merchant vessel can not be changed upon the high seas." (1917 Naval War College, International Law Documents, p. 154.)

*Chilean note, 1915.*—In a note to the diplomatic agents accredited to Chile, the position of that Government was made known upon the subject of reconversion of auxiliary vessels. In this note it was intimated that the principles enunciated would be "in conformity with the general convenience of the American Continent."

"Ministry of Foreign Relations,  
Santiago, March 15, 1915.

"To the Minister:

"This ministry has examined with a particular interest the question which has been submitted to it by the British Government in a note of February 4 last, relating to the possibility, for English merchant vessels which have served up till the present as auxiliary vessels of the British fleet, to resume their status of merchant vessels and to be treated in this capacity in the Chilean jurisdictional waters.

"The Second International Conference of Peace assembled at The Hague in 1907 authorized in convention vii the transformation of merchant vessels into vessels of war, determining at the same time measures intended to prevent abuses especially in reference to the reestablishment of the privateer, abolished by the Declaration of Paris of 1856.

"But neither the said conference nor the London Naval Conference of 1909 have regulated all the matters relative to maritime war and notably that of the reconversion to merchant vessels of vessels which, having formerly had this character, have subsequently been converted into vessels of war or auxiliaries to the armed fleet.

"Conformably to the general principles of international law the governments of neutral countries can regulate cases not provided for conventionally and apply in their jurisdictional waters the regulations which they adopt. The preamble of convention xiii of The Hague formally recognizes this right.

"The Government of Chile desires to settle the question suggested by the note above indicated according to the attitude of strict neutrality adopted by it since the beginning of the war and also in conformity with the general convenience of the American Continent, since the great European conflict has demonstrated in an evident manner that international rules should in the future take into consideration the particular conditions of this hemisphere.

"Inspired by this idea, the Chilean Government sees no inconvenience in admitting into the ports and jurisdictional waters of Chile and in treating in all respects as merchant vessels, vessels which have been auxiliaries of the fleet of one of the belligerent States, when the said vessels fulfill the following conditions:

"1. That the auxiliary vessel has not violated Chilean neutrality;

"2. That the reconversion took place in the ports or jurisdictional waters of the country to which the vessel belongs or in the ports of its allies;

"3. That this was effective; that is to say, that the vessel neither in its crew nor in its equipment gives evidence that it can be of service to the armed fleet of its country in the capacity of an auxiliary, as it was formerly;

"4. That the Government of the country to which the vessel belongs communicates to all interested nations, and in particular to neutrals, the names of auxiliary vessels which have lost this status to resume that of merchant vessels; and

"5. That the same Government give its word that the said vessels are not in the future intended for the service of the armed fleet in the capacity of auxiliaries.

Alejandro Lira."

(1916 Naval War College, International Law Topics, p. 28.)

*Conversion of auxiliary ships.*—It is evident that the conversion of auxiliary ships into merchant vessels was contemplated in 1928 in spite of the opposition which had been displayed in earlier years. Article 13 of the Habana Convention on Maritime Neutrality, to which

the United States is a party, under the general section on Duties and Rights of Belligerents is as follows:

"ARTICLE 13. Auxiliary ships of belligerents, converted anew into merchantmen, shall be admitted as such in neutral ports subject to the following conditions:

"1. That the transformed vessel has not violated the neutrality of the country where it arrives;

"2. That the transformation has been made in the ports or jurisdictional waters of the country to which the vessel belongs, or in the ports of its allies;

"3. That the transformation be genuine, namely, that the vessel show neither in its crew nor in its equipment that it can serve the armed fleet of its country as an auxiliary, as it did before;

"4. That the government of the country to which the ship belongs communicate to the states the names of auxiliary craft which have lost such character in order to recover that of merchantmen; and

"5. That the same government obligate itself that said ships shall not again be used as auxiliaries to the war fleet." (Report of the American Delegates, Sixth International Conference of American States, Habana, 1928, p. 220; post p. 41.)

While there might be question as to the propriety of placing this article under the section on duties and rights of belligerents, by its provisions the article seems to place upon the neutrals certain duties in regard to the admission of converted auxiliary ships.

(a) (3) *The "Xebe" and state B.*—The 1928 Habana Convention on Maritime Neutrality, article 13, made provision for admission to neutral ports of auxiliary ships of belligerents which had been converted anew into merchantmen. The implication was that such ships by conversion reverted to a former merchant status. The events of the World War had brought to the attention of some of the South American states the treatment of such vessels in South American ports.

There had been, particularly since the Second Hague Conference, 1907, much discussion of the rights of conversion of merchant vessels into vessels of war and their reconversion. The opinion of states seemed to be gen-



erally unfavorable to admitting such a right though no conclusion was reached in 1907.

The 1928 Habana convention article could not be stated to be a principle of international law binding states not parties to the convention, but merely a conventional agreement among parties to the convention.

*Unneutral service and neutrals.*—Unneutral service to one belligerent by a neutral vessel makes that vessel liable to treatment by the other belligerent as an enemy vessel. The neutral state whose flag the vessel flies assumes no responsibility for its conduct. It would be very difficult or impossible for a neutral state to supervise the conduct of all vessels sailing under its flag. The neutral state does, however, usually notify its nationals that it will not protect them in acts which are contrary to neutrality.

The carriage of contraband is at the risk of the carrier, the disregard of blockade regulations is at the risk of the vessel, and engaging in unneutral service makes the party concerned liable to penalty if taken by the belligerent. The neutral state would be involved only when it permits in its jurisdiction acts which might be construed as use of its territory as a base.

*Vessels liable to attack.*—Not all enemy vessels are liable to attack though the right to approach and visit in time of war is generally admitted except for neutral public vessels, and some enemy vessels may be attacked at sight.

Professor Hyde, in referring to public vessels, says:

"The absence of armament on a public vessel (not exempt from capture) has not been deemed to offer a sufficient reason why an enemy force should not attack it at sight. The exercise of this right does not appear to be limited to circumstances when attack or destruction is the only means of preventing escape. The unarmed public ship seems to be regarded as without the right to demand opportunity to surrender prior to attack even under circumstances when neither resistance nor flight would otherwise be attempted. Thus the existing practice excuses if not encourages reckless disregard of human life; for

the burden is on the ship to make special efforts to surrender before it is attacked."

"Even if it be admitted that the character of a public ship is always such as to justify the employment by the enemy of whatever force is necessary in order to reduce it to control, it does not follow that the use of force unnecessary to accomplish that end is always likewise justified. It is believed, therefore, that the attack upon such a vessel at sight should be confined to cases where the immediate use of force appears to be the only means of preventing the escape of the ship, or of interference with the attempt to effect its capture by another vessel of the same belligerent or by some other external force exerted in its behalf. The reasonableness of demanding restraint on the part of the enemy must be apparent in the case where the unarmed public vessel is, when encountered, known to be employed on a service unrelated to the prosecution of the war." (2 Hyde, *International Law*, p. 464.)

*Attitude of Ecuador, 1914.*—By a decree of November 28, 1914, Ecuador took action beyond that taken in its proclamation of neutrality of August 17, 1914, in which it had decreed strict observance of neutrality in accord with the Hague Convention of 1907 on the rights and duties of neutrals and in accord with the principles of international law.

The decree stated that:

"To the rules of the Convention of The Hague, to which the Government of Ecuador has resolved to conform, are added the following:

"1st. No merchant ship, no matter what be its nationality nor whether it belongs to a belligerent country or not, shall be allowed to leave an Ecuadorian port unless the authorities of the port have previously obtained from the consul of the nationality to which the ship belongs, a written certificate indicating the next port at which the ship will stop, as also its final destination, and stating that the ship's voyage is for commercial purposes only;

"2d. Whenever a case should arise in which a merchant ship had left or intended to leave an Ecuadorian port, and should have been an unusual time on its voyage to the port of its destination or should have taken an unusual route, or were not to have taken the direction stated by the consul; or, finally, should it, before reaching port, have changed its cargo, such a ship



shall be regarded as suspicious and on its next arrival at an Ecuadorian port may be detained by the Ecuadorian naval authorities and is liable to be considered as part of the belligerent forces of the Nation to which it belongs and to be treated as such." (1916 Naval War College, International Law Topics, p. 57.)

*Nicaraguan attitude, 1914.*—In a circular issued by Nicaragua, December 5, 1914, provision was made for internment of merchant vessels regardless of nationality if their conduct had been such as to involve suspicion. This circular contained the following statement:

"Fourth, mercantile vessels of any nationality that arrive at Nicaraguan ports under suspicious circumstances, such as having made false statements regarding their destination when sailing from a port of the Republic on a former occasion; being known, by official notice, to have supplied fuel or provisions to war vessels of belligerents; having employed an excessive length of time in their voyage; being painted with colors peculiar to war vessels or with similarly distinctive signs, shall be interned in their respective ports, the respective authorities of which shall immediately inform the Office of Foreign Affairs of the necessary ulterior measures." (1916 Naval War College, International Law Topics, p. 65.)

*Action of Argentine, 1914-15.*—In General Orders of December 26, 1914, the Government of Argentine decreed,

"ART. 3. When it is proven that a merchantman has transferred, by its own act, to war vessels the fuel which it has aboard, either as cargo or for its own necessary consumption, it shall be considered as an auxiliary to the war fleet, and the maritime authorities shall refuse \* \* \* being governed by considerations of the case \* \* \* to provide coal for the other boats in the same company." (1917 Naval War College, International Law Documents, p. 30.)

By a decree of January 22, 1915, internment was decreed for a vessel of belligerent nationality which had accompanied the German fleet,

"From conclusions based upon the adjoined documents signed by the captain of the German steamer *Seydlitz* upon putting in at the port of San Antonio Oeste, and by the captain of the



English bark *Drummuir* upon his disembarkation at the harbor of this city that the first-named steamer made part of the German South Atlantic and Pacific division from the 3d to the 8th of September last, to which it was ordered to go by the chief of that naval force, having on board the crew of the bark sunk by the cruiser *Leipzig*, for which circumstance it should be considered as an auxiliary boat of the German division, and for this reason unable to remain in an Argentine port more than twenty-four hours without infringing the neutrality laws.

*"The President of the Argentine Nation decrees that:*

"ARTICLE 1. The minister of the navy shall take action to have the German steamer *Seydlitz*, which has taken refuge in the port of San Antonio Oeste since the 18th of last December, convoyed by an Argentine vessel to Puerto Militar, where it shall be interned until the end of the present war." (Ibid, p. 31.)

The Argentine Government also interned other vessels engaged in auxiliary service of the belligerents.

*Supplying vessels of war at sea.*—In March 1915 by a joint resolution, Congress aimed to restrict the furnishing of supplies from American ports to belligerent vessels of war at sea. The resolution was stated as follows:

*"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, from and after the passage of this resolution, and during the existence of a war to which the United States is not a party, and in order to prevent the neutrality of the United States from being violated by the use of its territory, its ports, or its territorial waters as the base of operations for the armed forces of a belligerent, contrary to the obligations imposed by the law of nations, the treaties to which the United States is a party, or contrary to the statutes of the United States, the President be, and he is hereby, authorized and empowered to direct the collectors of customs under the jurisdiction of the United States to withhold clearance from any vessel, American or foreign, which he has reasonable cause to believe to be about to carry fuel, arms, ammunition, men, or supplies to any warship, or tender, or supply ship of a belligerent nation, in violation of the obligations of the United States as a neutral nation.*

*"In case any such vessel shall depart or attempt to depart from the jurisdiction of the United States without clearance for any of the purposes above set forth, the owner or master or person or persons having charge or command of such vessel*

shall severally be liable to a fine of not less than \$2,000 nor more than \$10,000, or to imprisonment not to exceed two years, or both, and, in addition, such vessel shall be forfeited to the United States.

"That the President of the United States be, and he is hereby, authorized and empowered to employ such part of the land or naval forces of the United States as shall be necessary to carry out the purposes of this resolution.

"That the provisions of this resolution shall be deemed to extend to all land and water, continental or insular, within the jurisdiction of the United States.

"Approved, March 4, 1915." (1915 U. S. Foreign Relations, Supplement, p. 851; 38 U. S. Stat., p. 1226.)

*The "Farn," 1915.*—The *Farn*, a British steamer, left Cardiff about September 5, 1914, with a provision "in her charter to deliver coal to warships if they so desired." The *Farn* was captured and a German prize crew was put on board. The *Farn*, or *KD-3* as she seems to have been called, was for about 3 months used by the German captors when she put in to San Juan, Porto Rico, for provisions and water. The United States Government decided to treat the *Farn* as an auxiliary in service of the German fleet.

As the *Farn* had not been condemned by a prize court, the British Ambassador maintained that the *Farn* should be treated as a prize which should be released under article 21 of Hague Convention XIII of 1907. The reply of the Secretary of State was that, as a result of investigation, it had been determined to order the vessel to leave port within 24 hours, and "upon failure to leave, that the vessel, together with the prize officers and crew, be interned, the British officers and crew and the Chinese seamen being released."

"Later, in reply to a further communication of the British Ambassador, the Department of State said:

"Your excellency states that it would be necessary before the vessel could be treated as a German fleet auxiliary that she should have been condemned by a competent prize court. With this conclusion the Government of the United States is under the necessity of disagreeing. In the opinion of this



Government an enemy vessel which has been captured by a belligerent cruiser becomes as between the two governments the property of the captor without the intervention of a prize court. If no prize court is available this Government does not understand that it is the duty of the captor to release his prize, or to refuse to impress her into its service. On the contrary, the captor would be remiss in his duty to his Government and to the efficiency of its belligerent operations if he released an enemy vessel because he could not take her in for adjudication.

"As to Article 21 of Hague Convention No. XIII of 1907 cited by your excellency as prescribing the treatment to be accorded to the *Farn*, it is only necessary to state that as it appears that His Majesty's Government has not ratified this convention it should not be regarded as of binding effect between Great Britain and the United States.

"In this relation I venture to call to your attention that the British Consul at San Juan protested on January 12 against the clearance of the *Farn*, and that your excellency in your note of January 13 requested that she be detained in the interest of neutrality. It was not until January 17 that your excellency informed the Department that His Majesty's Government presumed that the United States would act under Article 21 of Hague Convention No. XIII of 1907 in regard to the release of the vessel. Sufficient time had thus elapsed to allow for communication with British warships and their appearance off the port of San Juan. The result of releasing a German prize loaded with coal at this juncture needs no comment.

"In the circumstances the Government of the United States is under the necessity of adhering to its decision to intern until the end of the war the steamship *Farn* as a fleet auxiliary." (1915 U. S. Foreign Relations, Supplement, p. 823.)

*Habana Convention on Maritime Neutrality, 1928.*—The Habana Convention on Maritime Neutrality of February 20, 1928, was ratified by the United States and proclaimed in 1932 (Treaty Series 845). This convention had been considered at the Sixth International Conference of American States. As the report of the delegates of the United States of America states:

"The result was a modified draft, in large measure that of the thirteenth convention of the Second Hague Peace Conference of 1907, with sundry modifications and additions in order to take note of the measures which neutrals had taken to pre-



serve their rights during the World War. As finally drafted and originally adopted, the project presupposed a war, in which the American Republics would be neutral. For this reason it was indispensable that the practice of nations should be strictly observed, as it would be undesirable on the part of the American states to attempt to change the general rights of all neutrals by a special agreement of their own. There is, however, an American Republic without access to the sea. The Bolivian delegation proposed a modification of the general rule in case of war between American Republics, to the effect that the project should contain a clause, by virtue whereof neutral states should be obliged to permit the transportation of materials of war through their territories to an American state thus shut off from the sea, provided the neutral states should not consider that their vital interests were affected. The delegation of the United States conceived this to be a just provision under the circumstances, and voted for it. It was adopted as the second paragraph of Article 22, with a reservation on the part of Chile.

"The Argentine delegation proposed in committee amendments which it had suggested in the subcommittee. One of these, to the effect that armed merchantmen should be assimilated to auxiliary vessels in the service of belligerents, was carried and forms the last sentence of Article 12 of the convention. To this, the United States interposed a reservation, as did likewise Cuba and Uruguay. The convention was adopted in the plenary session of February 18, Chile and the United States expressly maintaining at the time of signing, their respective reservations." (Report of the Delegates of the United States of America to the Sixth International Conference of American States (1928), p. 18.)

(b) *The "Dobo" and commerce of state Y.*—Article 22 of the 1928 Habana Convention on Maritime Neutrality makes provision in regard to commerce between neutral and belligerents. This article also makes special provision for certain American states in regard to transit of goods.

In general neutral states are not under obligation to prevent shipments of cargo from their ports though the destination and character of the cargo may be determining factors in the treatment of the shipments by the belligerents. Habitual use of a neutral port as a source of supply for belligerent vessels of war may give

rise to questions in regard to the use of neutral territory as a base but the shipment of cargo from a belligerent port to a neutral port would not involve such questions. A neutral vessel which delivers supplies to a belligerent vessel of war may be considered by the opposing belligerent to have engaged in unneutral service but the risk rests upon the neutral vessel. Such a vessel would not be regarded as an auxiliary of the navy of the belligerent which would imply conversion, a recognized procedure in international law. Unneutral service by a neutral vessel does not put neutral states under obligations, but gives the belligerent rights of capture.

*Asylum in neutral ports.*—The question of asylum has long been a subject of discussion. The Institut de Droit International almost from its founding in 1873 gave attention to matters relating to capture, prize, and treatment of belligerent vessels by neutrals. Among the resolutions adopted in 1898 after discussion was the following on the Regulations Concerning the Legal Status of Ships and their Crews in Foreign Ports:

“ARTICLE 24. Granting of asylum to belligerents in neutral ports, although depending upon the pleasure of the sovereign State and not required of it, shall be presumed, unless previous notification to the contrary has been given.

“With regard to war-ships, however, it shall be limited to cases of real distress, in consequence of: 1. defeat, sickness, or insufficient crew; 2. perils of the sea; 3. lack of the means of subsistence or locomotion (water, coal, provisions); 4. need of repairs.

“A belligerent ship taking refuge in a neutral port from pursuit by the enemy, or after having been defeated by him, or because it has not a sufficient crew to remain at sea, shall remain therein until the end of the war. The same rule shall apply if it is carrying sick or wounded, and after having landed them, is in condition to go into action. The sick and wounded, though received and cared for, shall, after they have recovered, be also interned, unless considered unfit for military service.

“Refuge from the perils of the sea shall be granted to war-ships of belligerents only so long as the danger lasts. No greater quantity of water, coal, food or other analogous sup-



plies shall be furnished them than is necessary to enable them to reach their nearest national port. Repairs shall not be allowed except so far as necessary to enable them to put to sea. Immediately thereafter the ship shall leave the port and neutral waters." (Resolutions of the Institute of International Law, Carnegie Endowment for International Peace translation, p. 154.)

In the discussion of this article M. Kleen, one of the reporters upon the subject, referred to the third paragraph,

"Quant à l'asile à accorder aux navires en fuite, la solution du problème devient plus difficile encore que lorsqu'il s'agit de cas de détresse par suite d'événements naturels. A défaut d'occasions, on ne possède pas, à ma connaissance, un seul exemple de leur internement dans le port où ils se sont réfugiés devant l'ennemi, à l'instar de ce qui se passe sur terre. Mais il est clair que si, dans les conditions actuelles, les neutres permettaient aux bâtiments combattants de se réfugier chez eux devant une poursuite ou après une défaite, pour en ressortir après dans des conditions plus favorables, l'autre belligérant adresserait des réclamations très vives au souverain du port devenu ainsi un point d'appui pour lui arracher les fruits de sa supériorité. Dans la doctrine, on s'est peu occupé de la question; toutefois, ceux qui l'ont résolue dans le même sens que l'article ci-dessus, sont assez nombreux et considérables pour faire autorité.

"La permission pour un navire belligérant de retourner au combat après avoir complété son équipage dans un port neutre équivaldrait évidemment à une aide d'enrôlement, tout marin sur un bâtiment de guerre pouvant participer au combat." (17 *Annuaire de l'Institut de Droit International*, 1898, p. 68.)

The question of asylum in neutral ports again received the attention of the Institute in 1910 and was discussed in this Naval War College in 1911 (1911 Naval War College, *International Law Situations*, pp. 9-36).

*American treaties.*—Many American treaties of the nineteenth century had been similar to the treaty between the United States and Peru of 1887:

"ARTICLE XIII. When through stress of weather, want of water or provisions, pursuit of enemies or pirates, the vessels of one of the high contracting parties, whether of war, (public or private,) or of trade, or employed in fishing, shall be forced to



seek shelter in the ports, rivers, bays, and dominions of the ether, they shall be received and treated with humanity; sufficient time shall be allowed for the completion of repairs, and while any vessel may be undergoing them, its cargo shall not unnecessarily be required to be landed either in whole or in part; all assistance and protection shall be given to enable the vessel to procure supplies, and to place them in a condition to pursue their voyage without obstacle or hindrance." (25 Stat., 1444, 1450.)

*The case of the "Pisa."*—In a note of the German Embassy, March 26, 1915, it was stated that the *Pisa* of the Hamburg-American Line was to apply for clearance papers from New York to Hamburg and that the *Pisa* would try to communicate with a German cruiser in the Atlantic, to which it was maintained no objection could be made as no German vessel of war had taken supplies in this region within three months. The German Embassy referred to the note of the Department of State, December 24, 1914, in which it was stated that

"the essential idea of neutral territory becoming the base for naval operations by a belligerent is, in the opinion of this Government, *repeated* departure from such territory of merchant vessels laden with fuel or other supplies for belligerent warships at sea." (1914 U. S. Foreign Relations, Supplement, p. 648.)

Of this the German note of March 26, 1915, said,

"As already mentioned, no supplies for the German men-of-war involved here left the United States of America within the last three months. The words 'for belligerent warships at sea' make it clear, that it is immaterial whether the warship to be supplied is *in* port, *off* a port, or on the high sea. As a matter of fact in all three cases the only difference would be in the distance covered by the supply-carrying conveyance. Therefore no international law or agreement establishes such a difference. Nor is there any distinction made between furnishing supplies for a home journey or any other purpose. In fact, according to international law, there seems to be only one restriction put to supplying belligerent warships: that one ship can not be supplied from the same neutral port more than once within three months.

"It is obvious that it is for the party making the charge that such supplies have been furnished more than once within three months, to prove the charge by substantiated evidence.

"The Embassy must assume that the rules laid down in Mr. Bryan's note of December 24, 1914 are still in force. The resolution passed by Congress and promulgated on March 4, does not seem to alter any existing laws, but appears to empower the Executive to enforce laws already in existence." (1915 U. S. Foreign Relations, Supplement, p. 859.)

In replying to this statement, the Acting Secretary of State, on April 10, 1915, said:

"The memorandum quotes from the Department's note of December 24 last to the effect that the essential idea of neutral territory becoming the base for naval operations is repeated departure from such territory of merchant vessels laden with fuel or other supplies for belligerent warships at sea, and the memorandum draws the conclusion from Hague Convention No. XIII of 1907, that the word 'repeated' means 'more than once in three months.' The argument appears to be that, inasmuch as no supplies for German men-of-war have left the United States within three months, no objection ought to be raised to the clearance of the *Pisa* though it is admitted that she intends to transfer her cargo, if possible, to a German cruiser on the high seas.

"It is true that the Department's note of December 24 discussed the meaning of 'base of operations,' but it was also pointed out that the obvious result of the practice of sending supplies to warships at sea, would be that such warships could remain on their stations engaged in belligerent operations without the inconvenience of repairing to port for supplies. Both of these assertions must be considered as they present different phases of the same question. It is the opinion of this Government that the result of supplying warships in order that they may avoid the danger or inconvenience of visiting a neutral port would be in contravention of the rules of international law and the provisions of Hague Convention No. XIII. Both Articles 19 and 20 of that convention indicate unquestionably that the coaling of warships from stores gathered at a neutral port or roadstead is to take place *in* that port or roadstead, and these provisions are regarded as consonant with the existing rules of international law on the subject. It is obvious that to carry fuel and supplies to a warship on its station at sea is not furnishing her with fuel within a neutral port. I am, therefore, under the necessity of disagreeing with your statement that 'it is imma-



terial whether the warship to be supplied is *in* port, *off* port, or on the high seas.'

"The reasons for this rule are evident, when its application is considered. In the first place, as only sufficient coal and supplies may be furnished a warship to enable it to reach its nearest home port, neutrals must, in order to determine the amount, be specifically advised of the size of the vessel, the number of the crew, the amount of fuel and supplies already on board, and the place of transshipment. Without knowledge of these facts it would be impossible to limit the cargo of a vessel so that the warship could not take on board more coal or supplies than the rule of international law permits. In the second place after the departure of a supply boat from the jurisdiction of the United States, this Government would have no control over the vessel to prevent delivery to a different warship from the one supposed to be entitled to replenishment, even though the supplies furnished far exceeded the amount permitted by international law. In the third place, as a belligerent warship may not, in any event, supply itself in the ports of a neutral power more than once in three months, a neutral government, before allowing coal and supplies to be taken to a belligerent warship from its ports, should be satisfied that none had been obtained by the same vessel within the preceding three months. This information can be had only from the warship itself, unless it has during the period entered a neutral port, or been in direct communication therewith. In any event the amount of the stores to be supplied, and the time when they may properly be furnished are questions of fact, and not matters of presumption.

"Furthermore, the allowance of coal and supplies by a neutral to a belligerent warship is based on the presumption that the latter intends to return to its home port. There can, however, be no such presumption in the present case. In fact the presumption is that no German warship would attempt to return home when there is a virtual investment of German ports by hostile naval forces. On the contrary it may be assumed with reasonable certainty that a German warship which remains on the high seas, purposes to take supplies in order to continue hostile operations against vessels of belligerent nationality and to intercept and search neutral vessels. If, therefore, such a warship is supplied with an amount of coal and supplies in excess of the amount permitted by law, the neutral territory from which such stores are derived, would clearly constitute a depot for the projection of the naval operations of a belligerent in contravention of the rules of international law and



Article 5 of Hague Convention No. XIII of 1907." (Ibid, p. 862.)

*Entrance of vessels of war in time of peace.*—While it was formerly common to permit foreign vessels of war to enter ports in time of peace, in recent years restrictions have been placed on such entry. This is partly due to the change in the character of vessels of war from the comparatively weak sailing vessels to the battleships of modern navies.

Regulations varying in strictness were general even before the World War. The customary requirement was prior diplomatic notice, sometimes of a specified number of days.

Certain named ports were closed to entrance of vessels of war and sometimes to merchant vessels also.

The restriction as to the number of vessels that might enter in time of peace was also common. The time of sojourn was usually specified.

Of course, local port regulations were to be observed by visiting vessels of war, and quarantine regulations also prevailed even for public vessels.

To closed ports admission in time of peace may be permitted to vessels in distress for any reason. The argument is that the rights of humanity take precedence over regulations dictated by political or strategic expediency. In time of war the same liberality of interpretation does not prevail.

*Norwegian rules, 1912.*—The Norwegian rules of December 18, 1912, in time of peace proclaimed that,

"War vessels of belligerent powers are permitted to enter ports and roadsteads as well as other territorial waters of the kingdom. At the same time admission is subject to the exceptions, restrictions, and conditions which follow:

"1. (a) It is forbidden belligerent war vessels to enter the ports and roadsteads of war, which have been proclaimed as such.

"(b) It is also forbidden such vessels to enter inner territorial waters whose entrances are closed by submarine mines or other means of defense.

"(c) The King reserves the right to forbid under the same conditions to the two belligerent parties, access to other Norwegian ports or roadsteads and other defined parts of the interior Norwegian waters, when special circumstances demand and for safeguarding the sovereign rights of the kingdom and to maintain its neutrality.

"(d) The King also reserves the right to forbid access to ports and roadsteads of the kingdom to belligerent war vessels which have neglected to conform to rules and prescriptions promulgated by the competent authorities of the kingdom and which have violated its neutrality." (1917 Naval War College, International Law Documents, p. 184.)

A general regulation applied to all warships of foreign nationality as prescribed in royal ordinances of January 20, 1912, August 21, and September 11, 1914.

"No foreign war vessels except those mentioned in article 4 can enter the Norwegian war ports or naval stations without having obtained the authorization of His Majesty the King or of the persons authorized by him to this effect.

"It is necessary to indicate in advance the types and names of war vessels for which the authorization to enter Norwegian war ports or naval stations is solicited, as well as the date of arrival and duration of sojourn.

"Without special authorization in extraordinary cases the sojourn in a war port or naval station can not exceed eight days, and in general no more than three war vessels belonging to the same nation will be permitted to sojourn simultaneously in the same port." (Ibid, p. 187.)

The excepted classes mentioned under article 4 were:

"(a) Every war vessel on which the Chief of State of a foreign nation is traveling and the vessels which convoy it.

"(b) War vessels which find themselves in immediate danger from the sea, which are always permitted to have recourse to the ports of the kingdom.

"(c) War vessels intended for or engaged in the surveillance of fisheries or of hydrographic work and other scientific objects." (Ibid, p. 188.)

Similar rules were issued by other Scandinavian states.

*Rules in World War.*—The rules announced by neutral states during the World War varied somewhat,

but usually aimed to restrict repairs to a limit which would not make the port a base and thus make the neutral state liable.

The Brazilian rules stated on August 4, 1914,

"ART. 13th. The belligerent warships are allowed to repair their damages in the ports and harbors of Brazil only to the extent of rendering them seaworthy, without in any wise augmenting their military power.

"The Brazilian naval authorities will ascertain the nature and extent of the proper repairs, which shall be made as promptly as possible." (1916 Naval War College, International Law Topics, p. 11.)

The proclamations of other states were to similar effect.

In the discussion of sojourn for repairs at the Second Hague Peace Conference, 1907, the Brazilian delegation presented a lengthy memorandum upon asylum in neutral ports in course of which it was said,

"(7) When a belligerent war-ship takes refuge in a neutral port or territorial waters, to escape pursuit by its enemy. if it is unable to complete the necessary repairs or to take on sufficient supplies to enable it to put to sea within the period allowed it, that is to say twenty-four hours, it is preferable, as a guaranty, for the neutral State to intern it until the end of the war.

"That is the surest way of conforming to the true spirit of neutrality. This would not be too rigorous a proceeding, for the necessity of closing the ports to these vessels would thus be avoided, which closing might entail heavy damages, and moreover the complications which the difficulty of this delicate question might lead to would be avoided.

"We can here proceed in the same manner only in the case of vessels in distress as the result of damage caused by the condition of the sea.

"In this last case the solution accepted by all is to allow the vessel admitted under these conditions to depart freely; but if this is done and if in a particular case the vessel is given refuge, this would be a first infringement of the principle of the inviolability of neutral ports and waters, which infringement would naturally be regarded as complete, if the belligerent vessel is not subsequently required to depart upon the expiration of



the customary period of twenty-four hours in these ports or waters.

"Humanitarian considerations should undoubtedly decide neutrals to receive a pursued belligerent vessel, this aid being indispensable to enable it to escape a danger which might seriously jeopardize the situation of those on board or expose the vessel to certain loss unless it takes refuge in the first port it comes to.

"But when this duty is once performed and the established rules covering the matter have been set aside to give way only to Christian sentiments, which demand not only that the vessel be admitted, but even that the neutral go to its aid to save it maintenance of his neutrality by the neutral requires that these vessels be held in the neutral's ports and waters and disarmed there, and that they shall not take any further part in hostilities for the duration of the war." (III Proceedings Hague Peace Conferences, Carnegie Endowment translation, p. 586.)

At the Second Hague Peace Conference frequent mention had been made of the rules of the Treaty of Washington of 1871 under which the *Alabama* award had been made. The British proposal on the subject of asylum from enemy pursuit had been as follows:

"ARTICLE 15. When a war vessel of a belligerent takes refuge in neutral waters in order to escape pursuit by the enemy it is incumbent upon the Government of the neutral State to intern it until the end of the war." (Ibid, p. 699.)

Article 17 of the Hague Convention XIII which was adopted by the conference in 1907 provides:

"In neutral ports and roadsteads belligerent war-ships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay."

This rule has been generally reaffirmed.

*Netherlands declaration, 1914.*—While opposition was voiced against the Netherlands declaration of August 5, 1914, the Netherlands Government continued to enforce its provisions in order to ensure its neutrality. Articles 4 and 5 of this declaration provide the general rule and the exception.

"ART. 4. No warships or ships assimilated thereto belonging to any of the belligerents shall have access to the said territory.

"ART. 5. The provisions of article 4 do not apply to:

"1. Warships or ships assimilated thereto which are forced to enter the ports or roadsteads of the State on account of damages or the state of the sea. Such ships may leave the said ports or roadsteads as soon as the circumstances which have driven them to take shelter there shall have ceased to exist.

"2. Warships or ships assimilated thereto belonging to a belligerent which anchor in a port or roadstead in the colonies or oversea possessions exclusively with the object of completing their provision of foodstuffs or fuel. These ships must leave as soon as the circumstances which have forced them to anchor shall have ceased to exist, subject to the condition that their stay in the roadstead or port shall not exceed 24 hours.

"3. Warships or ships assimilated thereto belonging to a belligerent employed exclusively on a religious, scientific, or humanitarian mission." (1916 Naval War College, International Law Topics, p. 62.)

In article 5 there is a distinction made between admission to the continental waters (art. 5—1) and admission to waters of the colonies or overseas possessions (art. 5—2). In the first case, exception is made for "damages or the state of the sea." In the colonies and overseas possessions, exception is made for fuel and foodstuffs. Owing to the limited coast line and few ports, it could not be expected that belligerents who had used any reasonable degree of care would be compelled to resort to a Dutch port for supplies or fuel.

*United States-Panama agreement, October 10, 1914.*—During the period before the United States entered the World War, questions in regard to the treatment of vessels entering ports under American jurisdiction often arose. In the relations between the United States and Panama a protocol stated the attitude of these parties.

"Protocol of an agreement concluded between Honorable Robert Lansing, Acting Secretary of State of the United States, and Don Eusebio A. Morales, Envoy Extraordinary and Minister Plenipotentiary of the Republic of Panama, signed the tenth day of October, 1914.



"The undersigned, the Acting Secretary of State of the United States of America and the Envoy Extraordinary and Minister Plenipotentiary of the Republic of Panama, in view of the close association of the interests of their respective Governments on the Isthmus of Panama, and to the end that these interests may be conserved and that, when a state of war exists, the neutral obligations of both Governments as neutrals may be maintained, after having conferred on the subject and being duly empowered by their respective Governments, have agreed:

"That hospitality extended in the waters of the Republic of Panama to a belligerent vessel of war or a vessel belligerent or neutral, whether armed or not, which is employed by a belligerent power as a transport or fleet auxiliary or in any other way for the direct purpose of prosecuting or aiding hostilities, whether by land or sea, shall serve to deprive such vessel of like hospitality in the Panama Canal Zone for a period of three months, and *vice versa*.

In testimony whereof, the undersigned have signed and sealed the present Protocol in the city of Washington, this tenth day of October, 1914.

ROBERT LANSING

EUSEBIO A. MORALES"

(1916 Naval War College, International Law Topics, p. 94; 38 Stat. 2042.)

In accord with this protocol a neutral vessel, whether or not armed, if directly employed for aiding hostilities by land or sea might, so far as sojourn in the Canal Zone or in Panama is concerned, be treated as a belligerent vessel of war.

*Proclamation, November 13, 1914.*—In rules 1 and 2 of the proclamation of the President of the United States, November 13, 1914, relating to the neutrality of the Panama Canal Zone, the attitude of the United States was even more clearly stated than in the protocol with Panama of October 10, 1914.

"*Rule 1.* A vessel of war, for the purposes of these rules, is defined as follows: a public armed vessel, under the command of an officer duly commissioned by the government, whose name appears on the list of officers of the military fleet, and the crew of which are under regular naval discipline, which vessel is qualified by its armament and the character of its personnel to



take offensive action against the public or private ships of the enemy.

"*Rule 2.* In order to maintain both the neutrality of the Canal and that of the United States owning and operating it as a government enterprise, the same treatment, except as hereinafter noted, as that given to vessels of war of the belligerents shall be given to every vessel, belligerent or neutral, whether armed or not, that does not fall under the definition of Rule 1, which vessel is employed by a belligerent Power as a transport or fleet auxiliary or in any other way for the direct purpose of prosecuting or aiding hostilities, whether by land or sea; but such treatment shall not be given to a vessel fitted up and used exclusively as a hospital ship." (1916 Naval War College, International Law Topics, p. 97; 38 Stat. 2039.)

Other rules of this proclamation provide for the same treatment in passage, taking supplies, fuel, etc., for "vessels of war of a belligerent or vessels falling under rule 2." Even in case of distress, vessels "falling under rule 2" were subject to the same restrictions as vessels of war.

(c) *The "Xibi" in a closed neutral port.*—In time of war the extension of restrictions upon the movements of belligerent public vessels in neutral waters has been common. A state whether in time of peace or of war has jurisdiction over its territorial waters. As the character of instruments of war has changed, regulations and responsibilities have changed. It was found essential for neutrals to make different regulations for the sojourn and departure of vessels of war under sail and under steam as well as for aircraft.

Ports closed to commerce are supposed to be closed to all vessels. In a naval closed port the control and often the ownership of the fuel is usually in the government. Any aid to a belligerent naval vessel in a neutral closed port would be of the nature of aid by neutral public authority which is not lawful.

#### SOLUTION

(a) 1. The *Xara* may remain in the port of neutral state B for 24 hours unless state B has previously issued

special regulations. During the 24-hour sojourn the *Xara* may make such repairs as possible using the personnel and material on board. After 24 hours the *Xara* should be interned.

2. Unless neutral state B has previously issued special regulations, it may not decline to allow to the *Aba* the usual privileges granted to neutral merchant vessels in its harbors.

3. If neutral state B and belligerent state X are not bound by special treaty agreement, and if state B has not previously issued special regulations, state B may legally decline to admit, except under the rules for vessels of war, the *Xebe* which has been transformed from a supply to a merchant vessel.

(b) There is no obligation on the part of state E or other neutral states to treat the *Dobo* as an auxiliary of the navy of state Y.

(c) If the *Xibi*, a vessel of war of state X, enters in distress a closed port of neutral state E, the *Xibi* should be interned or may be allowed or required to depart under pledge to take no further part in the war.